Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses

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I. INTRODUCTION

The Supreme Court's recent decision in *Wolman v. Walter*[1] raises again the question whether the "final page" has been written with respect to a troublesome period in the constitutional development of religion clause[2] principles. The United States Supreme Court has now addressed itself to a complete array of state aid programs designed to assist pupils attending church-sponsored educational institutions. After thirty years of intensive litigation the slate looks something like this:

Year	*Programs in Conformity with First Amendment*	*Programs Violative of First Amendment*
1947	School bus transportation[3]	
1968	Textbook loans[4]	
1970	Real property tax exemption for religious organizations[5]	
1971	Federal construction grants for church-related colleges[6]	Salary supplements for lay teachers[7]
		Secular education service contracts calling for state to pay nonpublic school for providing secular education[8]

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1. 97 S. Ct. 2593 (1977).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The religion clause comprises two parts: the establishment clause prohibits the government from promoting religion and the free exercise clause prohibits the government from inhibiting religion.

3. Everson v. Board of Educ., 330 U.S. 1 (1947).

4. Board of Educ. v. Allen, 392 U.S. 236 (1968).

5. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

6. Tilton v. Richardson, 403 U.S. 672 (1971).

7. Lemon v. Kurtzman [Early v. DiCenso], 403 U.S. 602 (1971) (*Early* was a case arising out of Rhode Island that was consolidated with the Pennsylvania case, *Lemon v. Kurtzman*, for purposes of appeal).

8. Lemon v. Kurtzman, 403 U.S. 602 (1971) (Pennsylvania statute declared unconstitutional).

1973	Tax-exempt bond assistance for construction at church-related colleges[9]	Grants to schools for cost of general testing and record-keeping[10]
		Tuition reimbursement for low income parents[11]
		Parental tax credits[11]
		Grants to schools for maintenance and repair[11]
		Parental reimbursement grants[12]
1975		Instructional equipment and material loaned to schools[13]
		On-premises health and remedial services[13]
1976	Direct, per-student grants to church-related colleges[14]	
1977	Standardized tests and scoring services[15]	Instructional equipment and material loaned to pupil[15]
	Speech and hearing diagnostic services[15]	Field trip transportation[15]
	Physician, dental, and optometric services[15]	
	Neutral-site therapeutic services[15]	
	Neutral-site remedial education services[15]	
	Programs for handicapped[15]	
	Neutral-site guidance and counseling[15]	
	Assistance grants for students attending church-related colleges[16]	

In its 1976 decision in *Roemer v. Board of Public Works*[17] the Supreme Court intimated that the end of the line was near:

> [T]he slate we write on is anything but clean. Instead, there is little room

9. Hunt v. McNair, 413 U.S. 734 (1973).
10. Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).
11. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).
12. Sloan v. Lemon, 413 U.S. 825 (1973).
13. Meek v. Pittenger, 421 U.S. 349 (1975).
14. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).
15. Wolman v. Walter, 97 S. Ct. 2593 (1977).
16. Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd mem.*, 98 S. Ct. 39 (1977).
17. 426 U.S. 736 (1976).

> for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.[18]

Similarly in *Wolman*, Justice Blackmun observed: "Nonetheless, the Court's numerous precedents 'have become firmly rooted, . . .' and now provide substantial guidance."[19] Justice Stewart, the author of the majority opinion in *Meek v. Pittenger*,[20] saw himself as applying tests which constituted a distillation of the past decades of effort:

> These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws "respecting an establishment of religion," and thus provide the proper framework of analysis for the issues presented in the case before us.[21]

Notwithstanding these assurances by the Court that this area of the law is settled, the question still remains: has the thoughtful scholarship of the Supreme Court's most respected Justices provided a framework that will avoid continued controversy? This article will show that they have not. Despite the strong assertions in recent decisions by the Court that religion clause principles are well defined, the fact is that there have been periodic major shifts in the factors the Court considers in judging the constitutionality of a state aid program. These shifts have had a divisive impact on the Court. In recent years this division has resolved itself into a three-way split. This article attempts to identify the current trend of the Court in state aid cases by analyzing this split and the recent movement of the swing group of Justices.

II. CHARTING A NEUTRAL COURSE BETWEEN THE FREE EXERCISE AND ESTABLISHMENT CLAUSES—THE TRIPARTITE SPLIT IN THE COURT

Two issues must be addressed any time a state aid program is presented to the Court. The first, which may be called the establishment issue, is raised by opponents of state aid to sectarian schools. The argument is that such aid constitutes a prohibited "establishment of religion," or at least the first step toward such an establishment. The second issue, which may be called the free exercise issue, is advanced by proponents of the state assistance program. The proponents feel that since they pay education taxes a portion of the tax

18. *Id.* at 754.
19. Wolman v. Walter, 97 S. Ct. 2593, 2599 (1977).
20. 421 U.S. 349 (1975).
21. *Id.* at 358.

proceeds should be used to help finance their children's education. Without an allocation of tax funds toward the education of their children, they are forced either to bear the financial burden of paying twice for their children's education—once through taxes and once through tuition—or to send their children to the public school. This, proponents assert, restricts their freedom of choice and inhibits their "free exercise" of religion.

In an attempt to reconcile the constitutional conflict between the establishment and free exercise clauses the Court developed a three-part test for judging the various state programs. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' "[22]

Careful analysis reveals that the relative significance of the establishment clause and the free exercise clause in first amendment cases is sometimes ignored. Justice Brennan, who now maintains that almost all forms of assistance to pupils at church-related schools is violative of the establishment clause, recognized a place for the free exercise doctrine in his concurring opinion in *Abington School District v. Schempp*:[23]

> Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election.[24]

In spite of his recognition of free exercise values, Justice Brennan has been unwilling to concede that placing a condition—attendance at the *public* schools—upon a gratuitous state benefit can discourage the free exercise of religion by "diminishing the attractiveness" of the

22. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citation omitted).

23. 374 U.S. 203 (1963).

24. *Id.* at 242 (Brennan, J., concurring).

church-related school. Such an attitude toward free exercise objectives led to Chief Justice Burger's plea:

> One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.[25]

The Court's difficulty with this perplexing question has been aggravated by its necessity of fashioning majority votes on a patchwork, case-by-case basis. The opinion of the Court in *Walz v. Tax Commission*[26] reflects the difficulty encountered in attempts to fashion sweeping religion clause principles:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
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> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.[27]

In an amicus brief, Leo Pfeffer, who has argued a great number of the religion clause cases before the Supreme Court of the United States, described the past decades of constitutional history in this area as a "historic game of chess." Although cases were won or lost and governing principles seemed well defined, the fact is that the pieces of the jigsaw puzzle were being "forced together."[28] The compromise, case-by-case approach utilized by the Court has misled both proponents and opponents of state assistance to nonpublic pupils and has fostered continued litigation. Legislation was drafted in reliance on sweeping utterances that in retrospect proved to be illusory.

In practice the tripartite test articulated by the Court does little to balance the competing interests embodied in the two religion clauses. The Court itself now speaks of the test only as a guide with

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25. Meek v. Pittenger, 421 U.S. 349, 387 (1975).

26. 397 U.S. 664 (1970).

27. *Id.* at 668-69.

28. Brief of National Coalition for Public Education and Religious Liberty Amicus Curiae at 10, Wolman v. Walter, 97 S. Ct. 2593 (1977).

which to identify instances in which the objectives of the establishment clause have been impaired. This tripartite test, however, serves more as a framework for structuring opinions than as a guidepost for determining the outcome. The objectives of the establishment clause, likewise, are too vague to be outcome-determinative. An analysis and understanding of the three-way split among the Supreme Court Justices,[29] however, may be more productive in predicting whether a given aid program will withstand religion clause challenge. Chief Justice Burger and Justices Rehnquist and White seem prepared to approve a broad range of meaningful child benefit programs in the form of grants, credits, scholarships, loans, and vouchers.[30] On the other hand, it is with a great deal of reluctance that Justices Brennan, Marshall, and Stevens approve even health-related services.[31] The middle is comprised of Justices Blackmun, Powell, and Stewart, and the outcome of future constitutional challenges will depend on the direction in which they lean.[32]

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29. The tension among the members of the Court is perhaps not fully revealed by the opinions themselves. The depth and intensity of these tensions may very well stand currently as a barrier to the formation of a predictable and stable five-Justice coalition. This internal tension is explainable in part by the frustration that must flow from the Court's apparent inability to formulate a comprehensive analysis in this troublesome area, and also by the compromises required to obtain five votes. The internal tension is also a natural by-product of a case-by-case legislative approach that has backfired because of a failure to consider fully the implications of pronouncements in a given case upon future challenges.

The tension and frustration within the Court is undoubtedly aggravated by the fact that the Court has had to make decisions that vitally affect the inculcation of religious belief, the extension of knowledge, and the education of children on the basis of abbreviated stipulations of fact, facial challenges, or evidentiary transcripts that barely pierce the surface of relevant educational and religious developments. The difficulties arising from inadequate factual development are further compounded by the lack of historical record or legislative history with respect to the religion clause. There were no public schools when the first amendment was adopted, and the structure of American education has changed markedly since then. The religion clause preceded general acknowledgment of the need for universal formal education. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Thus, the Court for decades has been forced into a situation of attempting to apply vaguely defined principles to an ever-shifting set of circumstances and considerations from which it has not yet been able to extricate itself.

30. *See, e.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977) (Burger, C.J., and White and Rehnquist, JJ., voted to uphold all six categories of aid presented to the Court); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (Burger, C.J., and White and Rehnquist, JJ., voted to uphold direct, per-student grants to church-related colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (Burger, C.J., and White and Rehnquist, JJ., voted to uphold all three types of aid presented to the Court).

31. *See, e.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977) (Brennan and Marshall, JJ., voted to strike down all six categories of aid presented to the Court; Stevens, J., voted to strike down four categories of aid and to uphold diagnostic and therapeutic services, the latter two with "misgivings"); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976)(Brennan, Marshall, and Stevens, JJ., voted to strike down direct, per-student grants to church-related colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (Brennan and Marshall, JJ., voted to strike down all three types of aid presented to the Court).

32. *See, e.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977) (Blackmun and Stewart, JJ., voted to uphold four of the six categories of aid presented to the Court and to strike down loans of instructional material and field trip transportation; Powell, J., voted to uphold five categories and to strike down loans of instructional material); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (Blackmun and Powell, JJ., voted to uphold and Stewart, J., voted to strike down direct, per-student grants to church-related colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (Stewart, Powell, and Blackmun, JJ., voted to uphold textbook loans and to strike down loans

In order to appreciate the current alignment of the Justices and the state of the law after *Wolman* it is necessary to consider the historical positions of the Court. It is important to note that prior to 1971 the Court generally affirmed state aid to church-related schools. In that year the Court abruptly shifted its position regarding aid to elementary and secondary schools. Now, after *Wolman*, it appears that the Court is swinging back toward approval of some programs.[33] This article focuses on these swings and pays particular attention to the pivotal cases *Walz v. Tax Commission*[34] and *Wolman v. Walter*.[35] As will be seen, *Walz* marked the end of Supreme Court approval of state aid to church-sponsored schools and began a period in which every state program, with the exception of aid to sectarian colleges, was struck down. *Wolman* is now the first case to turn away from the strict position the Court has held since *Walz*.

III. PRE-*Walz* CRITERIA: SECULAR PURPOSE AND EFFECT

The first case to consider the relationship between state aid to church-sponsored education and the religion clause was *Everson v. Board of Education*.[36] New Jersey had enacted a law that would reimburse parents for the expense of busing their children to public and parochial schools. The *Everson* Court said that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "[37] The Court held that the New Jersey program had not made the slightest breach in the wall of separation. The Court further held that to prohibit the state from extending general welfare benefits to *all* of its children would be to violate the neutral position required by the first amendment.[38]

Between 1947 and 1968 *Everson* stood as the leading case in the religion clause field. The principles first set forth in *Everson* were further refined during the two decades following its decision[39] and were applied again to a nonpublic school aid case in the form of a two-part purpose-and-effect test[40] in *Board of Education v. Allen*:[41]

of instructional material and on-premises health and remedial services). Note that the positions taken by these Justices have determined the holding of the Court.

33. For a graphic representation of the swings in the Court, see the chart in section I of this article.

34. 397 U.S. 664 (1970).

35. 97 S. Ct. 2593 (1977).

36. 330 U.S. 1 (1947).

37. *Id.* at 16.

38. *Id.* at 18.

39. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961), which upheld the constitutionality of Sunday sales prohibition laws; Zorach v. Clauson, 343 U.S. 306 (1952), which upheld the constitutional validity of programs permitting public schools to release students during the school day who desire to attend off-premises religion courses.

40. The two-part test was first laid down in the context of a school prayer case, Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

41. 392 U.S. 236 (1968).

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[42]

In *Allen* the Court upheld a New York program whereby local school boards loaned approved textbooks to all children, including sectarian school students, in grades seven through twelve. Before the Court was able to find "a secular legislative purpose and a primary effect that neither advances nor inhibits religion,"[43] it was necessary for the Court to declare that the "processes of secular and religious training [in church-sponsored schools] are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[44]

The *Allen* Court's recognition of the valuable role played by nonpublic education was obviously a key factor in the decision. Justice White, writing for the majority, utilized language that greatly increased the hope and expectations of proponents of aid to nonpublic school pupils:

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.[45]

Many nonpublic school parents, educators, and administrators read *Allen* as saying that carefully drafted aid programs that have the primary effect of aiding the secular educational functions in their schools would satisfy establishment clause restraints. It is difficult to quarrel or find fault with this interpretation. This is obviously why opponents of nonpublic school aid have sought repeatedly during the past nine years to convince the Supreme Court that *Allen* should be reversed. In recent years, however, the Court has given little

42. *Id.* at 243 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
43. *Id.*
44. *Id.* at 248.
45. *Id.* at 247-48.

more than lip service to the *Allen* principles[46] and has in fact emasculated its underpinnings. The two-part test has been accompanied by a third ingredient that has proved dominant in recent cases.

IV. INTRODUCTION OF THE ENTANGLEMENT TEST— THE IMPACT OF *Walz v. Tax Commission*

In 1970, the Supreme Court handed down a decision that has had perhaps a greater impact upon the education cases than any case since *Everson*. *Walz v. Tax Commission*[47] questioned the constitutional validity of real property tax exemptions for property used exclusively for religious purposes. The plaintiff, a real property owner, sought an injunction to prevent the granting of property tax exemptions to religious properties, arguing that such exemptions forced him to make a contribution to religious bodies contrary to the establishment clause. In determining the constitutional validity of such exemptions, the Court looked to whether taxation or exemption occasioned a greater degree of involvement between government and religion, thus evidencing its concern with the amount of entanglement between secular and sectarian interests. The Court commented in dictum: "Obviously a direct money subsidy would be pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."[48] Although the Supreme Court had in prior decisions showed a concern about the degree of involvement between government and religion, this dictum gave birth to a third and separate constitutional test for judging religion clause cases. Now, in addition to determining that the legislative purpose and effect of a state program did not promote or inhibit religion, it became necessary for a court to inquire whether the administration of the program fosters "excessive government entanglement with religion."[49]

The first state aid to nonpublic school statutes to be tested subsequent to *Walz* were the Pennsylvania statute considered in *Lemon v. Kurtzman*,[50] and the Rhode Island statute considered in the companion case, *Earley v. DiCenso*.[51] The Rhode Island statute called for a salary supplement to lay instructors teaching secular subjects in the Rhode Island parochial schools. The Pennsylvania statute called for a contractual relationship between the nonpublic school and the state under which the state reimbursed the nonpublic schools for providing

46. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).
47. 397 U.S. 664 (1970).
48. *Id.* at 675.
49. *Id.* at 674.
50. 403 U.S. 602 (1971).
51. *Id.*

teacher salaries, textbooks, and instructional materials in specified secular subjects. Both statutes were declared violative of the first amendment. Chief Justice Burger, who had authored the *Walz* opinion, delivered the opinion of the Court in which the purpose and effect test in *Allen* became a tripartite inquiry:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."[52]

Both statutes passed the first prong of the tripartite inquiry; in neither the Pennsylvania nor the Rhode Island statutes did the Court find a nonsecular legislative purpose. The second inquiry, whether the principal or primary effect of the statutes was one that did not promote or inhibit religion, was a more difficult one for the Court to answer. Chief Justice Burger reasoned that it was possible for the legislatures of the respective states to identify secular aspects of a church-sponsored education and to design restrictions to insure that the state aid would benefit only the secular. The Court did not decide, however, whether the specific safeguards in the Pennsylvania and Rhode Island programs were sufficient to meet the primary effect test. Instead the Court condemned the programs because of the intrusiveness of the safeguards into the church-sponsored school: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[53]

If meaningful assistance to the nonpublic educational sector appeared dead as a result of the *Lemon* decision, *Committee for Public Education v. Nyquist*[54] seemed to complete the process and seal the coffin. The Supreme Court in *Nyquist* declared unconstitutional, as violative of the establishment clause, direct grants to nonpublic schools for maintenance and repair of school facilities and equipment, tuition reimbursement to low income parents of children attending nonpublic schools, and income tax relief to all such parents. On the same day as *Nyquist*, the Court also announced *Sloan v. Lemon*,[55] which declared Pennsylvania's parental reimbursement

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52. *Id.* at 612-13 (citation omitted).
53. *Id.* at 620.
54. 413 U.S. 756 (1973).
55. 413 U.S. 825 (1973).

grants unconstitutional, and *Levitt v. Committee for Public Education*,[56] which declared unconstitutional the New York statute providing state reimbursement to nonpublic schools for testing and record-keeping. The cumulative impact of these decisions and that in *Lemon v. Kurtzman* was to place those who would seek to draft legislation providing nonpublic school assistance on the horns of a dilemma. If they included safeguards and procedures to insure that the assistance was limited to the secular aspects of nonpublic education, the restrictions would be classified as prophylactic contacts involving excessive government entanglement with religion. If the restrictions were removed, the program would fail because of the absence of assurance against advancement of religion.

Program safeguards and regulations were not the only kinds of church-state "entanglements" envisioned by the Court. In addition it saw a danger of "political divisiveness"[57] arising from the natural inclination of nonpublic schools to lobby in the legislatures for additional funds. Although he recognized that political debate and differences are normal and healthy manifestations of the democratic system of government, Chief Justice Burger declared that political division along religious lines was "one of the principal evils against which the First Amendment was intended to protect."[58] This test seemed based upon the assumption that as more assistance became available to nonpublic education, a greater demand would arise, and this demand would inevitably lead to political division along religious lines.

The negative attitude of the Supreme Court towards the "self-perpetuating and self-expanding propensities"[59] of state assistance to pupils at church-related educational institutions is reflected in Chief Justice Burger's belief that "[a] certain momentum develops in constitutional theory, and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."[60] The Court was obviously alarmed at the rapid step from *Allen* to *Lemon* and *DiCenso*. It was willing to allow bus rides and textbooks, but saw the prospect of much broader scale assistance when it looked at the teacher salary supplement program in *DiCenso* and the educational contract program in *Lemon*. The momentum was too much; the Court refused to adopt the philosophy of Justice Harlan that "[i]t is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls

56. 413 U.S. 472 (1973).
57. Lemon v. Kurtzman, 403 U.S. 602, 623 (1971).
58. *Id.*
59. *Id.* at 624.
60. *Id.*

that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold."[61]

The repressive constitutional doctrine that was based on a fear of political divisiveness was spawned by the Court during its "momentum blocking" stage of development. Chief Justice Burger's enunciation of this doctrine in *Lemon* was surprising, if not shocking, in view of fact that just one year earlier in *Walz*, he had espoused the right of religious organizations and churches to take strong positions on public issues without the slightest suggestion that this would disqualify their adherents from participating in public benefits. The Chief Justice had written:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.[62]

It is perhaps understandable that the Court was concerned by the momentum that had gathered between *Allen* and *Lemon*; it is unfortunate, however, that the response between 1971 and 1975 was a series of case-by-case compromises rather than the development of constitutional principles of more lasting guidance. Beginning in 1971, the Court began a cut and paste process in deciding how far the program could proceed without reaching the verge of forbidden territory under the religion clauses. It refused to accept the invitation of opponents of such educational programs to declare them all violative of the establishment clause. On the other hand, there seemed to be no logical basis for distinguishing one program from the other. Sweeping utterances, seemingly clear in one case, had to be altered to meet the Court's attitudes concerning the verge of forbidden territory in another. This seemed the result of judicial legislation. It was in recognition of these problems that Justice Rehnquist in his dissent in *Committee for Public Education v. Nyquist* noted that "[w]ithin the limits permitted by the Constitution, these decisions are quite rightly hammered out on the legislative anvil."[63]

Additional doctrines were developed by the Court that had the effect of further emasculating the theoretical underpinnings of *Allen*. The acceptance of dual and separable secular and religious roles in nonpublic education was replaced with a presumption that these are

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61. Walz v. Tax Comm'n, 397 U.S. 664, 699-700 (1970) (Harlan, J., concurring).

62. *Id.* at 670.

63. 413 U.S. 756, 813 (1973).

"religious-pervasive institutions,"[64] and that aid to the secular functions of the schools cannot be separated from the religious functions. Justice Stewart, writing for the majority in a later case, concluded:

> [I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion.[65]

V. DISSENTERS' REACTION TO THE HARSH IMPACT OF *Lemon* AND *Nyquist*

The dissenting opinion of Chief Justice Burger in *Nyquist* reveals that the entanglement test, which he set forth in *Walz* and expanded in *Lemon*, had in *Nyquist* gone much further than he had anticipated. It was being utilized to bar forms of assistance that he felt provided benefits to children rather than churches and thus met constitutional standards. The tolerant attitude expressed by Chief Justice Burger in his *Nyquist* dissent may very well be attributable to a reconsideration of the potential tensions between the establishment and free exercise clauses. While commenting upon the application of the two clauses the Chief Justice stressed free exercise principles: "[T]he balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families." [66] Chief Justice Burger also reflected a different reaction to "momentum blocking" when he noted that "[i]t is no more than simple equity to support partial relief to parents who support the public schools they do not use."[67]

Justice White's dissent in *Nyquist* stated the free exercise argument even more forcibly:

> Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. They could receive in return a free education in the public schools. They prefer to send their children, as they have the right

64. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

65. Meek v. Pittenger, 421 U.S. 349, 365-66 (1975) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

66. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 802 (1973) (Burger, C.J., dissenting).

67. *Id.* at 803.

> to do, to nonpublic schools that furnish the satisfactory equivalent of a public school education but also offer subjects or other assumed advantages not available in public schools. Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or, to put it another way, up to the amount the parents save the State by not sending their children to public school.
>
> In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young. "When the state encourages religious instruction . . . it follows the best of our traditions."[68]

Justice Rehnquist's dissent in *Nyquist* reveals that he likewise would have upheld the tuition reimbursement and tax relief provisions of the New York statute in recognition of the "benevolent neutrality"[69] required in order to reconcile the tension between the free exercise and establishment clauses. His dissent recognized that financial restraints to free exercise exist when nonpublic school parents are compelled to pay for their own children's education as well as support public school services unused by them.

Notwithstanding the Chief Justice's shift in attitude and the strength of the Rehnquist and White dissents, an even more extreme and restrictive application of the tripartite test was made in the 1975 case *Meek v. Pittenger*.[70] *Meek* struck down a program that involved loaning equipment and providing health services to nonpublic schools. It was the culmination of the era of persistent Supreme Court disapproval of state aid to church-sponsored schools. Strangely, though, this disapproval did not extend to state aid to church-sponsored colleges. These cases, by their contrast, illuminate the hostility the Court's majority held toward religious education.

VI. Approval of State Aid in Higher Education Cases: A Religion-Effectiveness Test?

If a lawyer in 1971, after reviewing the *Lemon* opinion, were called upon to opine as to the constitutionality of federal legislation providing grants for the construction of buildings at church-related colleges, the thrust of his opinion would be quite predictable. After reciting the tripartite test, the lawyer would advise that it would be necessary to establish comprehensive restrictions in order to insure that the legislation did not result in advancement of religion. Absent restrictions, the legislation would fail the primary effect test because of the danger that the

68. *Id.* at 814 (White, J., dissenting) (quoting Zorach v. Clauson, 343 U.S. 306, 313-14 (1952)).

69. *Id.* at 810 (Rehnquist, J., dissenting).

70. 421 U.S. 349 (1975). See notes 77-86 *infra* and accompanying text.

mandated aid could be applied to a sectarian purpose. On the other hand, if the legislation contained adequate restrictions it would fail because of excessive government entanglement with religion. At least this would be the likely content of the opinion if that lawyer had not read *Tilton v. Richardson*,[71] which was announced the same day as *Lemon*. The tests and guiding principles read the same in *Tilton* as in *Lemon*, but the same tests apparently have different meanings when applied at different levels of education.

In sustaining the constitutionality of construction grants to church-related colleges, the Court was impressed by the fact that churches are less successful in the accomplishment of their religious missions in colleges than in elementary or secondary schools: "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."[72] Although many of the church-state cases relating to elementary and secondary education are decided on the basis of an assumed composite profile of church-related schools, the court in *Tilton* rejected that approach: "We cannot . . . strike down an Act of Congress on the basis of a hypothetical 'profile.' "[73] A comparison of *Tilton* and *Lemon* simply confirms the ad hoc approach that has been used by the Court in this area of the law. The Court seems more skeptical of the possibility of religious inculcation in church-related colleges and thus more tolerant of aid programs to them.

After approving federally funded construction grants to church-related colleges in *Tilton*, the Supreme Court next approved a state program for construction of church-related colleges with state-issued, tax-exempt bonds in the case *Hunt v. McNair*.[74] In *Hunt* the state-created authority that issued the bonds would take title to the facility and lease it back to the college, with reconveyance to the college upon full repayment of the bonds. The *Hunt* decision was announced the same day as *Nyquist*. The same words were used in describing the tests but these words again were applied differently. The Court refused to adopt a composite profile of the religious nature of post-secondary institutions and differentiated the colleges from the church-related elementary schools on the basis of the differing religious character of the institutions.

Perhaps the most surprising of all of the recent higher education cases was *Roemer v. Board of Public Works*.[75] The Court upheld a Maryland statute that provided direct annual subsidies to church-re-

71. 403 U.S. 672 (1971).
72. *Id.* at 686.
73. *Id.* at 682.
74. 413 U.S. 734 (1973).
75. 426 U.S. 736 (1976).

lated colleges in an amount equal to fifteen percent of the state's expenditure for students in state colleges. The Court again stressed the secular functions of the religious colleges and the religious function of church-related elementary and secondary schools.

Although colleges undoubtedly seek to accomplish their religious goals differently from elementary and secondary schools, it is indeed doubtful that a religious organization would sponsor and administer a church-related college if it did not consider it to be part of its religious mission. It seems obvious that the extent to which a religious organization is able to inculcate religious values or religious doctrine in students attending its colleges varies from college to college. In a recent case a district court in Tennessee observed:

> It should be noted here that the evidence adduced established that some, but not all, of the private schools [colleges] whose students benefitted from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization.[76]

The Supreme Court has purportedly refused to use composite profiles in higher education cases, but the truth is that it has used standard profiles in evaluating the nonsecular nature of colleges, just as it did in cases concerning aid to elementary and secondary schools. It assumes as a general proposition that church-related colleges are not as effective in their religious goals as elementary and secondary schools. Coupled with the Court's assumption that elementary and secondary sectarian schools are "religious-pervasive institutions," this presents a question whether the Court is establishing a preferred religion based on the effectiveness of its mission to inculcate religious values during the education process.

The difficulty with such an analysis is that it acts as a restraint upon the free exercise of religion. Simply put, the test seems to be that an educational institution may receive a share of education tax dollars only if it is ineffective in its religious mission. The trouble with this approach is that it places the Court in the position of making value judgments as to the desirability and effectiveness of religious beliefs and religious missions. The Court found a rationale to justify its compromise, but it may again find that it has entered an extremely uncomfortable thicket. This sort of evaluation of the "religion-effectiveness" of the institutions involved does not represent the neutrality that the free exercise clause requires. When the Court approves direct state aid to a Catholic college but denies a cultural field trip bus ride to a child attending a Jewish grade school it is advancing one form of religious activity and impeding another. Does this approach not establish a

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76. Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97, 100 (M.D. Tenn. 1977), *aff'd mem.*, 98 S. Ct. 39 (1977).

Court-preferred method of teaching religion, and place financial obstacles in the way of religious training that does not comply with the Court's preference?

VII. STRANGLING ENTANGLEMENT—THE COURT'S SHIFT FROM STRICT DISAPPROVAL TO BALANCING

It must be recalled that for some time before *Wolman* no state aid to church-related elementary or secondary schools had been approved by the Court. The religion-effectiveness approach that apparently emerged in the higher education cases indicated a hostility of the Court towards effective religious education. The culmination of this period of strict disapproval of elementary and secondary aid came in the case *Meek v. Pittenger*.[77]

In *Meek* the Court was presented with a state program that loaned textbooks and instructional equipment and materials to the schools and provided on-premises health and remedial service to the students. Justice Stewart authored an opinion in *Meek* that brought himself and his fellow swing Justices, Blackmun and Powell, together in a coalition with the three Justices who were then most opposed to state aid to parochial schools—Justices Douglas, Brennan, and Marshall. His effort to state principles that would be guiding or controlling in future litigation, however, proved to be disastrous, as it brought internal tensions within the Court to a high point. Chief Justice Burger's dissent contained a bitter and stinging rebuke, reflecting his conviction that the Court was ignoring the free exercise clause and discriminating against children because of the exercise of religious choice by their parents. He charged that the consequence of the Court's holding was to "penalize *institutions* with a religious affiliation," to "affirmatively stifle . . . religious activity," and to "penalize *children* . . . who have the misfortune to have to cope with the learning process under extraordinarily heavy physical and psychological burdens." According to the Chief Justice, the *Meek* ruling "literally turns the Religion Clauses on their heads."[78]

Insofar as the legislative program in *Meek* provided auxiliary health and remedial services to nonpublic school children on the same basis as public school children, the free exercise implications of excluding the nonpublic school children were apparent. Should a child be denied an inherently secular diagnostic or remedial service simply because his parents had selected a church-related school? The Supreme Court had already held that "no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of*

77. 421 U.S. 349 (1975).

78. *Id.* at 386-87 (Burger, C. J., dissenting).

their faith, or lack of it, from receiving the benefits of public welfare legislation.' "[79] Nevertheless, Justice Stewart stressed the establishment rather than the free exercise clause when he concluded that the services would be provided "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."[80] He found that the state would be required to engage in unconstitutional surveillance to insure that a speech and hearing therapist, hired and controlled by the local public school district, would not sneak religion into speech therapy. It was obviously in response to Chief Justice Burger's stinging rebuke that a footnote to Justice Stewart's opinion[81] indicated that the Court did not challenge the right of the state to make free auxiliary services available to all students in the Commonwealth, including those who attended church-related schools. The footnote, however, failed to specify the constitutionally acceptable mechanism for providing such services to all children.

Meek reaffirmed *Allen* by upholding the constitutional validity of the textbook aid, but declared the supply of instructional material and equipment to be unconstitutional. The Court again justified this result on the basis of the "predominantly religious character of the schools benefiting from the Act."[82] A question arises, however, with respect to this rationale because the Court recognized that the materials and equipment were "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use."[83] The Court did not explain how a secular piece of equipment that could not be used for religious purposes would have the primary effect of advancing religion in a church-related school. Neither did it explain how the lending of a secular package of math cards advanced religion when a math textbook containing the same information did not. Justice Rehnquist in his dissent pointed out that "[o]nce it is conceded that no danger of diversion exists, it is difficult to articulate any principled basis upon which to distinguish the two Act 195 programs."[84] The extent to which the entanglement test as enunciated in *Walz* had been expanded in *Meek* led Justice Rehnquist to observe: "[A]ppellees are left to wonder, with good reason, whether the possibility of meeting the entanglement test is now anything more than 'a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.' "[85]

79. Sherbert v. Verner, 374 U.S. 398, 410 (1963) (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).

80. Meek v. Pittenger, 421 U.S. 349, 371 (1975).

81. *Id.* at 368 n. 17.

82. *Id.* at 363.

83. *Id.* at 365.

84. *Id.* at 391 (Rehnquist, J., dissenting).

85. *Id.* at 394 (quoting Edwards v. California, 314 U.S. 160, 186 (1941)(Jackson, J., concurring)).

Justice Rehnquist also took the majority to task for "throwing its weight" on the side of those who believe that society as a whole should be secular rather than religious:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government shows a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[86]

Since *Meek* had stretched the entanglement test beyond the breaking point and aggravated the inherent tension between the free exercise and establishment clauses, it was inevitable that a case like *Wolman v. Walter*[87] would follow on its heels. The Ohio legislation before the Court in *Wolman* was drafted for the specific purpose of testing the limits of *Meek*. It was suggested in *Meek* that some of the services may have been constitutional but the Court refused to treat the legislation as being severable.[88] The Ohio legislature sought to avoid having the Court strike down its entire program by enacting twelve separate categories of aid, in separately labeled paragraphs,[89] specifically designated as independent and wholly severable.[90] The Supreme Court acceded to the wishes of the legislature and treated the various aid provisions as severable, sustaining nine sections while rejecting the constitutionality of three.

The *Wolman* Court dealt with the various types of aid in separately numbered portions of its opinion, and not all portions mustered the same majority of the Justices. State aid categories approved by the Court are (1) textbook loans to pupils,[91] (2) standardized testing and

86. *Id.* at 395-96 (quoting Zorach v. Clauson, 343 U.S. 306, 313-14 (1952)).

87. 97 S. Ct. 2593 (1977).

88. Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).

89. OHIO REV. CODE ANN. § 3317.06(A)-(L) (Page Supp. 1976).

90. *Id.* § 3317.06 (Page Supp. 1976) states: "Moneys paid . . . shall be used for the following independent and fully severable purposes . . . ."

91. Wolman v. Walter, 97 S. Ct. 2593, 2599-600 (1977) (upheld by six Justices).

scoring,[92] (3) diagnostic services—speech, hearing, and psychological testing—provided on premises by professional employees of the local boards of education,[93] and (4) therapeutic services—speech, hearing, and psychological therapy, and programs for emotionally disturbed and handicapped children—provided off-premises by professional employees of the board of education.[94]

Programs whose constitutionality were rejected are (1) loans to pupils of instructional materials and equipment incapable of diversion to religious use[95] and (2) transportation for field trips that are the same as those provided in public schools.[96]

The Ohio statute sought to test the abuse of free exercise concepts in *Meek* by calling for the remedial educational services, provided to public school pupils, to be provided to nonpublic school pupils either at a public school, a public center, mobile home or a similar neutral site. Services less susceptible to the inculcation of religious beliefs such as health and diagnostic services were to be provided in the nonpublic school. It was difficult for the Court to ignore the free exercise implications of a denial of these services under such circumstances. Would the Court label a nonpublic school pupil as a sectarian citizen even when he was led off the school premises? Would the sectarian badge stand as a barrier to the receipt of secular, neutral, and nonideological services even in public facilities?

The plaintiffs in *Wolman* argued that even when nonpublic school children were off school premises, they were "an identifiable sectarian group," and that aid could not be provided to such a sectarian class. Did such an argument mean that these children were identifiable sectarian children when they went to the movies, when they went to a grocery store, when they participated in dances with other children, or when they went to a public library? The Supreme Court had already rejected programs that provided identical services to church-related school children at their school. The free exercise clause of the first amendment would have become meaningless if the Court had held that children must be denied therapeutic and remedial services by public employees, under control of the local public school district, at public facilities simply because they are registered pupils at church-related schools. Although the Court again passed up the opportunity to speak directly to the tension between the establishment and free exercise clauses, it upheld the constitutional validity of providing educational and therapeutic services at neutral sites and the constitutional

92. *Id.* at 2600-01 (upheld by six Justices).
93. *Id.* at 2601-03 (upheld by eight Justices).
94. *Id.* at 2603-05 (upheld by seven Justices).
95. *Id.* at 2605-07 (invalidated by six Justices).
96. *Id.* at 2608-09 (invalidated by five Justices).

validity of providing health and diagnostic services at the church-related school.

The Court in *Wolman* did not base its decision on free exercise principles, but seemed to adopt Chief Justice Burger's child benefit approach in noting that "[t]he dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils."[97]

VIII. REALIGNMENT OF THE JUSTICES: A MORE PERMISSIVE APPROACH TO NONPUBLIC SCHOOL AID

The *Wolman* decision was the first case since *Allen* in which the Court upheld meaningful assistance to children attending church-related elementary and secondary schools. Since the *Wolman* decision allowed $88,800,000 per biennium to continue to flow under the Ohio plan, it dispelled the notion created by *Meek* that any attempt to provide substantial aid to nonpublic school children would be blocked.[98] Although the $88,800,000 per biennium assistance is of extreme importance to children attending Ohio's nonpublic schools, the long-range implications of *Wolman* in the continuing development of first amendment principles relating to nonpublic school aid are of much greater import. For one thing, the *Wolman* decision suggests that Justice Powell is ready to join the Burger-Rehnquist-White voting block. Justice Powell's concurring opinion in *Wolman* reflects one of the most enlightened views expressed in this troublesome constitutional area.

Justice Powell noted that we have reached a point in the twentieth century far removed from the dangers that prompted the framers to include the establishment clause in the Bill of Rights. He argued that the risk of religious control over democratic processes or deep political divisiveness along religious lines was quite small when viewed against the contributions of the sectarian schools. The following extract from Justice Powell's concurring opinion indicates that *Wolman* does not present the final word, and that properly drafted legislation providing secular assistance to pupils rather than institutions may yet find a receptive court:

> Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek v. Pittenger* . . . that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek*

97. *Id.* at 2605.

98. *Id.* at 2610 (Brennan, J., dissenting).

> itself would have to be overruled, along with *Board of Education v. Allen*, . . . and even perhaps *Everson v. Board of Education* . . . . The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest.[99]

Justice Powell would have approved field trip transportation under the Ohio program and also a more restricted program of lending instructional materials and equipment to the pupils. This places him very close conceptually to the position advanced by Chief Justice Burger since 1973. Justice Blackmun's opinion for the Court[100] in *Wolman* may also be interpreted as setting the stage for a new approach in the area. It approves programs calling for substantial assistance to elementary and secondary school children, differentiates between children and the religious school they attend, and places greatly reduced stress upon the political divisiveness doctrine.

Those who saw *Wolman* as opening the door to a new and more permissive approach to aid to nonpublic school programs found their view supported by the October 3, 1977 Supreme Court affirmance of *Americans United for the Separation of Church and State v. Blanton*.[101] The legislation challenged in *Blanton* was a Tennessee program of assistance grants for pupils at public and church-related colleges. The three-judge district court sustained the Tennessee legislation on the basis of the child benefit theory promulgated in *Everson* and *Allen*, and on the basis of the "broad class of recipients" theory suggested in *Nyquist*.[102] Thus, precedent was found in the elementary and secondary school cases. Although the three-judge district court in *Blanton* did not specifically address the internal tension between the establishment and free exercise clauses, it noted that the purpose of the Tennessee program was to "provide needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian, or nonsectarian."[103] It also relied to a substantial degree upon the Supreme Court's dismissal of an appeal from a South Carolina decision for want of a substantial federal question. The South Carolina Supreme Court had approved a loan program to students at public and nonpublic colleges.[104] It sustained the legislation on the grounds that it was "scrupulously neutral as between religion and irreligion and as between various religions."[105]

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99. *Id.* at 2613 (Powell, J., concurring) (citations omitted).

100. *Id.* at 2597-609.

101. 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd mem.*, 98 S. Ct. 39 (1977).

102. *Id.* at 102-03 (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973)).

103. *Id.* at 105.

104. Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dismissed*, 413 U.S. 902 (1973).

105. *Id.* at 413.

Does the Court's affirmance of *Blanton* mean that legislative programs providing loans, grants, scholarships, vouchers or tax credits to pupils at nonpublic educational institutions will be sustained if (1) such benefits are provided to a broad base of recipients, (2) the grants are to the pupils or their parents and not to the institutions, and (3) the legislative program is scrupulously neutral with respect to religion? Does the fact that Justices Marshall, Brennan, and Stevens would have noted probable jurisdiction in *Blanton* lend support to the theory that Justices Powell, Stewart, and Blackmun are leaning more in the direction of the Burger-Rehnquist-White bloc than in the direction of the Brennan-Marshall-Stevens bloc? The answer to these questions is not yet clear.

IX. CONCLUSION

Although the United States Supreme Court has now considered constitutional challenges to almost every conceivable form of legislation providing assistance to nonpublic school pupils, it does not appear that the final page has been written. The inherent tension between the free exercise and establishment clauses remains. The slate is "anything but clean" with respect to the criteria to be applied in future cases, but the criteria leave substantial room for "play in the joints" and new developments can be anticipated.

Public school financing is in a state of upheaval. Federal court remedies ordered in racial desegregation cases have caused short-range chaos. Some local school districts are uncertain whether to look to the local property tax, state funding, or the federal courts for resolution of their financial problems. School districts throughout the country are embroiled in litigation challenging the constitutionality of their formulae for public school financing. Public schools and nonpublic schools in some states have joined hands to search for common solutions.

Such joint efforts will undoubtedly look to decisions like *Wolman* for guidance. Public schools may want to move in the direction of per-pupil funding. Nonpublic schools would be well advised to concentrate upon child benefit assistance and upon legislation directed toward a broad class of beneficiaries. Thus, joint solutions for financial problems confronting public and nonpublic schools may lie ahead. Although these educational, financial, and constitutional problems are indeed perplexing, thoughtful scholarship directed toward the internal tensions in the first amendment between the establishment and free exercise clauses may bring a firmly rooted solution.